Summary of SC93648, *State of Missouri v. Robert Blake Blurton*
Appeal from the Clay County circuit court, Judge Larry D. Harman
Argued and submitted January 14, 2015; opinion issued March 15, 2016

Attorneys: Blurton was represented by Craig A. Johnston of the public defender's office in Columbia, (573) 777-9977; and the state was represented by Daniel N. McPherson of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man convicted of first-degree murder and sentenced to death appeals the trial court's judgment against him. In a decision written by Chief Justice Patricia Breckenridge, the Supreme Court of Missouri affirms the judgment – including the death sentences after completing its independent statutory review. The trial court did not err in admitting testimony from a fingerprint analyst. The trial court did not abuse its discretion in admitting certain cell phone tower evidence or in excluding certain testimony. It also did not abuse its discretion in denying the man's requests for a mistrial based on the inadvertent display of crime-scene photographs later admitted into evidence and shown to the jury.

The trial court also did not err in not submitting the man's proffered instruction for second-degree felony murder. Four judges agree – as explained in the principal opinion – that the proffered instruction was not required to be given because second-degree felony murder is not a "nested" lesser-included offense of first-degree murder and that the proffered instruction was improper because it did not comply with the Missouri approved instructions.

In a concurring opinion joined by one other judge, Judge Zel M. Fischer further explains that, even had the proffered instruction been in the proper form, it still could not have been submitted to the jury because there was no underlying felony charged, the jury had a choice of conventional second-degree murder and the jury specifically found – in considering the statutory aggravators submitted by the state – that no felony had been committed except the three first-degree murders. Moreover, regardless of whether the trial court erred in failing to submit Blurton's proffered instruction to the jury, there was no prejudice.

In an opinion joined by two other judges, Judge George W. Draper III concurs in result only. He would find the trial court was required to give a requested instruction for second-degree felony murder because – although it is not a "nested" offense – the legislature specifically denominated both conventional second-degree murder and second-degree felony murder as lesser-included offenses of first-degree murder. He would find, however, that the man was not prejudiced by the trial court's failure to give his proffered instruction because the jury explicitly rejected the facts that would have established the robbery as the underlying felony on which the instruction was based when it rejected those applicable aggravating factors in the penalty phase of the trial.

Facts: Robert Blurton was charged with murder for the June 2009 shooting deaths of his aunt and uncle, Sharon and Donnie Luetjen, and their 15-year-old granddaughter Taron Luetjen in

their home in Cole Camp. A 911 call was placed from Taron's cell phone, but the caller did not speak, and no police were dispatched. Two days later, a neighbor found the Luetjens' bodies, with each gagged, lying face-down on a pillow in the living room, with their hands bound behind their backs with fabric from Taron's canopy bed. Each had been shot once in the back of the head with a .22 caliber pistol Police found no evidence of forced entry. Police also found evidence of a robbery; cash was missing from the aunt's and uncle's wallets, and a dresser drawer with the uncle's arrowhead collection had been dumped out, and the arrowheads were missing. Two .22 caliber pistols were missing from the gun cabinet, and Taron's cell phone also was missing. Blurton's girlfriend identified his voice in the background of the 911 tape, after it had been enhanced by police to reduce noise. At trial in Clay County, the state's evidence included cell phone tower evidence that Blurton's cell phone had traveled from Kansas to Cole Camp on the night of the murders; evidence that Blurton's fingerprints and DNA were found on a mug in the living room; and his girlfriend's identification of his voice on the 911 tape. The jury found Blurton guilty of three counts of first-degree murder. Following the penalty phase of the trial, the jury recommended a sentence of death for each murder conviction, finding three statutory aggravators. Although the state presented evidence of the robbery, the jury did not find any aggravators relating to robbery. Blurton appeals.

AFFIRMED.

Court en banc holds: (1) The trial court did not err in refusing to submit Blurton's proffered jury instruction for the lesser-included offense of second-degree felony murder. This is not a situation in which the proffered instruction was a "nested" lesser-included offense of the charged offense – when the elements of the lesser offense are a subset of the greater offense – in which case the trial court must give the nested lesser-included offense instruction. Instead, Blurton's lesser-included offense of second-degree felony murder required proof of additional facts from those required to prove first-degree murder. But in any event, the trial court correctly rejected Blurton's proffered instruction because it was not in the proper form – as required by the Missouri approved instructions and their notes on use – and he did not request to modify his instruction in response to the court's ruling. On appeal, Blurton admits he failed to proffer a separate instruction for the underlying felony of second-degree robbery, as was required by the notes on use, and he did not describe the property he allegedly took. The trial court correctly rejected the improper instruction.

(2) The trial court did not err in making certain evidentiary rulings that Blurton now challenges.

> (a) The trial court did not abuse its discretion in admitting, over Blurton's objection, evidence of the location of the cell phone towers to which his cell phone connected on the night of the murders, showing him traveling from his home in Kansas to Cole Camp. Although the state was not offering its witness as an expert, the state showed the criminal intelligence analyst's qualifications were that he did telephone analysis and telephone toll analysis and was testifying about how he performed his assigned task. Further, this evidence did not require the testimony of an expert witness – Missouri courts have held that reading the coordinates of cell sites from phone records and plotting them on a map is not a scientific procedure or technique because cell phone records are factual records, and no special skill is required to plot them. The witness was not attempting to pinpoint

Blurton's specific location at a specific time but generally was showing Blurton's travel from Kansas more than 125 miles to Cole Camp.

(b) The trial court did not err in admitting the testimony of the state's latent fingerprint analyst. Blurton objected four times. Three of those times, the trial court sustained his objections and granted him all the relief he requested. The fourth time – the only instance in which the trial court overruled the objection – the objection was untimely, and similar testimony already had been admitted without objection.

(c) Blurton failed to preserve for appeal his claim that the trial court erred in excluding evidence that Taron's mother had motive and opportunity to commit the crimes. Before trial, the court ruled that Blurton could present evidence to the jury that the mother was at or near the scene of the homicide – but at trial, Blurton did not present any such evidence. Further, the court before trial ruled that Blurton could make an offer of proof for any evidence that would connect the mother directly with an overt act in the commission of the homicides and that, if successful in any offer of proof, he could present such evidence to the jury. While Blurton did present testimony in an offer of proof from two witnesses, he appeals only one, discussed in paragraph (e) below.

(d) The trial court did not abuse its discretion in excluding testimony that the Luetjens' daughter was afraid of Taron's mother based on rumors about the mother and a threatening call a friend of the Luetjens had received. Although the Luetjens' daughter also identified Blurton's voice on the 911 call, Blurton presented no evidence linking the daughter's fear of Taron's mother to any motive for her to falsely make the identification.

(e) The trial court did not abuse its discretion in denying the offer of proof Blurton made of the Luetjens' friend's proposed testimony. In the offer of proof, a friend of the Luetjens testified that, on the day the Luetjens' bodies were discovered, her sister had a conversation with Taron's mother, and the friend had several telephone conversations with Taron's maternal grandmother. The friend said that, during one of these calls, the maternal grandmother said, "If you do not tell me about my granddaughter, you'll end up dead just like her." The proffered testimony was not logically relevant to any material fact at issue in the trial. Because the Luetjens' daughter's testimony that she feared Taron's mother was excluded properly, and because Blurton did not attempt to call the neighbor who allegedly saw Taron's mother outside the Luetjens' home the day of the murders, it also was proper for the court to exclude evidence from the Luetjens' friend.

(3) The trial court did not abuse its discretion in denying Blurton's requests for a mistrial. The state inadvertently showed three separate witnesses and the jury graphic crime-scene photographs of the Luetjens. It had all its photographs stored in a PowerPoint presentation, and when it was attempting to get to certain photographs to show the witnesses on a television in the courtroom, the state inadvertently and briefly displayed the crime-scene photographs. In several instances, this drew a visible reaction from the jury. Blurton declined the trial court's offer to instruct the jury to disregard the photographs in an attempt to remove any prejudicial effects. The display of the crime scene photographs did not warrant the extreme remedy of a mistrial. Blurton presents no evidence the photographs were displayed intentionally, and all of the photographs

eventually were admitted into evidence and shown to the jury. Although the photographs were gruesome, it was because the crime scene was gruesome.

(4) In its independent review of Blurton's death sentence – as required by section 565.035, RSMo – this Court finds that nothing in the record suggests the jury recommended the death penalty under the influence of passion, prejudice or any arbitrary factor; the jury found three statutory aggravators, each of which was supported in the record; and Blurton's sentence is proportional to the penalty imposed in similar cases, considering the crime, the strength of the evidence and the defendant.

Concurring opinion by Judge Fischer: The author agrees with the principal opinion in all respects – including its explanation of "nested" lesser-included offenses and why the trial court was not required to give Blurton's proffered second-degree felony murder instruction – but writes separately to explain the court would not have erred in refusing this instruction even had it been tendered in the form required by the notes on use. Neither Blurton, the principal opinion nor the opinion concurring in result cite to a single case in which this Court permitted – let alone required – submission of a second-degree felony murder instruction based on an uncharged felony. The jury also considered the statutory aggravators submitted by the state and specifically was asked to consider whether the state had demonstrated an underlying felony of robbery, and it found no felony had been committed except the three first-degree murders. Further, even assuming the trial court committed error in failing to submit Blurton's proffered instruction to the jury, there was no prejudice. The jury had a choice other than capital murder and acquittal – conventional second-degree murder. It chose to find Blurton guilty of first-degree murder, resolving the issue of prejudicial impact in failing to include Blurton's proffered instruction of a further lesser-included offense.

Opinion concurring in result by Judge Draper: The author would find the trial court erred in failing to submit to the jury Blurton's requested instruction for the lesser-included offense of second-degree felony murder but that such error was not prejudicial.

The author would find that a trial court is required to submit any lesser-included offense a defendant requests, and he would find that second-degree felony murder is a lesser-included offense of first-degree murder. While second-degree felony murder does not meet the traditional "elements test" required for a "nested" lesser-included offense, the legislature – in section 565.025.2(1)(a), RSMo – specifically denominates both felony murder and conventional second-degree murder as lesser-included offenses of first-degree murder. Further, in accepting the conventional second-degree murder instruction, the trial court implicitly recognized there was a basis on which the jury could acquit Blurton of first-degree murder, and so it should have submitted Blurton's proffered second-degree felony murder instruction as well. Additionally, the state presented evidence that a robbery occurred at the Luetjens' home.

The author also would find that, although the law is unclear as to whether the trial court should have given Blurton an opportunity to modify his proffered instruction to comply with the Missouri approved instructions before submitting the instructions to the jury, it is not necessary to resolve this point now. Blurton did not ask to modify the instruction, nor was he prejudiced by the trial court's failure to give his proffered instruction for second-degree felony murder

predicated on a robbery. The jury explicitly rejected the facts that would have established the robbery by rejecting those applicable aggravating factors in the penalty phase of trial.

The author further notes that he believes the principal opinion overruled, by implication, a prior holding allowing plain error review of improperly worded jury instructions. He does not believe there is any conflict in that prior case between general principles of instructional review and Rule 28 and sees no need to diminish that prior holding in a footnote without further guidance or explanation.